



ATTORNEY GENERAL OF TEXAS  
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Ms. Laura Rodriguez  
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OR2004-5882

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205323.

The Northside Independent School District ("NISD"), which you represent, received a request for all information relating to a named student and teacher. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The submitted information is both related to a student and maintained by NISD and is therefore subject to FERPA.<sup>1</sup>

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<sup>1</sup>We note that, pursuant to FERPA, NISD has already redacted any information which might identify a student.

Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. *Id.* § 1232g(a)(1)(B). Thus, in this case, the requestor, as a parent of the student whose education records are requested, would generally have a right to the requested information under FERPA.<sup>2</sup> Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including ... counseling records[.]" Educ. Code § 26.004. Thus, the requestor would normally have a right to the requested information under section 26.004.

We note, however, that the some of the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfilment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. § 5106a(b)(1)(A), § 5106a(b)(2)(A)(viii). In accordance with CAPTA, section 261.201(a)(2) of the Family Code makes confidential "the files, reports, records, communications, and working papers used or developed in an investigation under [chapter 261] or in providing services as a result of an investigation." The Department of Family and Protective Services ("DFPS") is an agency authorized to conduct an investigation in a school under chapter 261.<sup>3</sup> Fam. Code §§ 261.103, .406. The submitted information includes an e-mail communication from DFPS. Because this document represents a communication developed in an investigation under chapter 261, this information is confidential per 261.201(a)(2). The remaining submitted information is not a file, report, record, communication or working paper *used or developed in an investigation under chapter 261* because the district is not an agency authorized to conduct an investigation under chapter 261. *See id.* Because you provide no indication that the remaining information at issue was developed or used in an investigation under chapter 261, we conclude that section 261.201 does not apply to the remaining submitted information.

Therefore, with regard to the e-mail communication from DFPS, the issue is the conflict of laws vis-à-vis a parent's right of access to the education record of his or her child when that record is the identity of a person making a report of alleged or suspected abuse or neglect under chapter 261. There is an inherent conflict between the provisions of FERPA and those of chapter 261 of the Family Code. FERPA requires an educational agency to release education records to parents of minor students. *Cf.* Gov't Code. § 552.114(b)(2)(granting

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<sup>2</sup>NISD acknowledges that it is aware of the right of a parent to access to information about his own child under FERPA.

<sup>3</sup>We note, however, that if the DFPS has created a file on this alleged abuse, the child's parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g); Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 ("A reference in law to the Department of Protective and Regulatory Service means the[DFPS].").

right of access to the student's parent or legal guardian). On the other hand, chapter 261 prohibits the disclosure of certain information concerning suspected child abuse.

We defer to the decision of the Family Compliance Office ("compliance office") of the United States Department of Education, the office responsible for interpreting and construing FERPA, to resolve this conflict between FERPA and chapter 261. The compliance office found that the Texas statute was promulgated pursuant to CAPTA and that any statutory conflict would therefore be between the two federal statutes rather than the Texas statute and FERPA. As the two federal statutes were in irreconcilable conflict, the compliance office concluded that CAPTA governs, being the later enacted statute. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that there also exists a potential conflict between section 26.004 of the Education Code and chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land [,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is preempted and "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M'Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we conclude that in the instant case CAPTA also prevails over section 26.004. Consequently, under Texas law enacted in accordance with CAPTA, the e-mail communication from DFPS, which we have marked, is made confidential by section 261.201(a)(2) of the Family Code. Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we find that the information that we have marked is excepted from required public disclosure as information made confidential by law.

Concerning the remaining submitted information, we address your assertion that the identity of the person who reported the suspected child abuse should be withheld. Section 261.101 of the Family Code provides that the identity of an individual making a report under chapter 261 is confidential. *See* Fam. Code § 261.101(d). To resolve the question of whether this section conflicts with FERPA, we turn to another letter from the compliance office dealing with the relationship of FERPA and a CAPTA-compliant state statute. In this letter the compliance office stated: